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CASE COMMENT

Lorna Richardson*

The Limits of Statutory Personal Bar: Leases and the Requirements of Writing
(Scotland) Act 1995

*Gyle Shopping Centre General Partners Ltd v Marks and Spencer plc*¹
provides further clarity on when s1(3) and (4) of the Requirements of Writing
(Scotland) Act 1995 can be used in relation to leases; the status of the
common law rules of *rei interventus* and homologation; and the effect of
landlords failing to take action in relation to past breaches of the lease.

A THE FACTS

The pursuer was the owner and landlord of the Gyle Shopping Centre, Edinburgh. The defender was one of two anchor tenants of the Centre. The landlord had entered into an agreement for lease with a third party, Primark, which involved the construction of a new building that would be partially constructed on the existing car parking areas. The lease between the pursuer and the defender granted to the defender *inter alia* a one third *pro indiviso* share of and in the car park. The lease also stipulated that the car park would only be used for parking for customers and staff of the Centre except to the extent that the Represented Parties otherwise agreed in writing. The landlord, the defender and the other anchor tenant, Morrisons, were collectively the Represented Parties. The lease provided that it could not be varied except in accordance with the provisions of the lease or by agreement (recorded in the Register of Sasines, Land Register or other successor Register) among the Represented Parties.

The lease made provision for a management committee, made up of representatives appointed by the Represented Parties. Evidence was led that, at a number of committee meetings, reference had been made to the Primark development, including the fact that it required an enlarged unit which would use up some car parking spaces. The minutes of the meetings noted that plans had been provided showing the extent of the reconfiguration of the Centre, together with the fact that planning approval had been obtained for the development. No objection was raised to the development at any of the meetings and, indeed, the defender's and Morrisons' representatives had endorsed the development. The minutes had been signed by an employee of

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¹ [2014] CSOH 122; 2015 S.C.L.R. 171; 2014 G.W.D. 26-527

the defender “for and on behalf of” the defender. The minutes stated “I confirm I have read the minutes of the above date and that they are an accurate reflection of the meeting. The proposals made therein are hereby approved”.

To progress the Primark development the pursuer had sought and obtained planning permission and relocated a number of tenants within the Centre at an estimated cost of £1 million. The pursuer wrote to the defender noting that approval for the development had been obtained via the management committee meetings and enclosed a deed of variation for signing. The defender, in response, drew attention to the formalities specified in the lease for alteration of the shared areas and noted that the defender did not agree to the proposed alterations to the car park. The pursuer contended that it had entered into a contract with the defender or that the defender had undertaken a unilateral obligation for the variation and partial extinction of the defender’s real rights so as to permit the development. The agreement or obligation was said to have been entered into verbally by the defender’s representatives at committee meetings and by the signing of minutes of those meetings. The pursuer averred that it had acted in reliance on the contract or unilateral obligation, with the defender’s knowledge and acquiescence, and that as a result the lease had been varied.²

The pursuer sought declarator that in the event it commenced construction of the development the defender would be personally barred from taking any action to prevent the pursuer from doing so. Three issues were set out for determination. The first was whether the pursuer could rely on s 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995.

B STATUTORY PERSONAL BAR

The focus of discussion was whether s1(3) applied to a lease. Section 1(3) applies to a contract or obligation mentioned in s1(2)(a) – that is a contract or unilateral obligation *for* the creation, transfer, variation or extinction of a real right in land - but not the creation or variation of a real right in land for which a written document is required by s1(2)(b).³ The pursuer argued that s1(3) applied because a lease can be a contract as well as the grant of a real right in land. As such it was argued that the lease could fall within both s1(2)(a)(i) and s1(2)(b). Lord Tyre noted that in *The Advice Centre for Mortgages v McNicoll*⁴ Lord Drummond Young had observed that the legislative intention was clearly to separate contracts relating to land, on the one hand, from dispositions and other deeds that actually effect the creation or transfer of an

² The pursuer’s position as set out at para [3] suggests that the pursuer’s claim is based on there being a contract or unilateral obligation to vary the lease. The report later makes clear that the pursuer had based its case on the lease having been varied – para [17]. The pursuer’s propositions in law are set out in para [13] which help clarify the pursuer’s position.

³ See the discussion at para [14]

⁴ 2006 SLT 591

interest in land on the other. Lord Drummond Young had held that the personal bar provisions in s1 should be confined to transactions that create rights which are purely personal and that s1(3) and (4) were not intended to apply to a transaction creating rights that could be made real by registration or taking possession. This fundamental distinction had to be given effect to in relation to leases. Where it could be inferred that the intention of the parties was that real rights would be created in favour of the tenant, the document would fall within s1(2)(b) and s1(3) would not apply. Lord Tyre agreed with Lord Drummond Young's analysis⁵, noting,

"I agree in particular that the 1995 Act draws a fundamental distinction between the creation of personal rights, where a party's actings may bar him from founding upon a failure to constitute the contract in a written document complying with section 2, and the creation of real rights, good against third parties, as regards whom a party's actings can have no such effect."⁶

In Lord Tyre's view Lord Drummond Young had identified sound policy reasons for drawing this distinction⁷. The distinction also respected the personal character of the doctrine of personal bar.⁸ Section 1(6) made clear that the same rules applied to the transfer, variation and extinction of rights as applied to the creation of rights. As such s1(3) had no application to the variation of a real right in land. That was so whether the real right was a right in the principal subjects leased or a real right granted as a pertinent to the principal subjects.⁹ Lord Tyre concluded that statutory personal bar would be capable of applying to an agreement to vary the terms of the lease, but not to a variation of the lease itself.¹⁰ The pursuer had based its case solely on the latter having occurred. As such it was necessary for Lord Tyre to consider the pursuer's alternative argument based on *rei interventus*.

C REI INTERVENTUS

The pursuer contended that because the common law rules of *rei interventus* and homologation were not expressly displaced by the 1995 Act, other than in relation to contracts and obligations mentioned in s1(2)(a), they remained in force for the constitution of rights under s1(2)(b)¹¹. The pursuer's argument

⁵ Paras [14] and [16]

⁶ Para [16]

⁷ See *McNicol* at paras [16] – [18]

⁸ Para [16], referring to the explanation of the issue by Lord President Rodger in *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901

⁹ The pursuer had sought to distinguish *The Advice Centre for Mortgages v McNicol* on the basis that the lease in that case related to the creation of a lease whereas the current case concerned a real right in pertinents that were ancillary to the lease.

¹⁰ Para [17]

¹¹ The pursuer relied on Professor Rennie's opinion to this effect in "Requirements of Writing: Problems in Practice" [1996] SLPQ 187

was that if it could prove *rei interventus* and homologation,¹² it would cure the defects of form in the variation.

Lord Tyre was not persuaded by this argument. His Lordship noted that there was nothing in the Scottish Law Commissions' report¹³ preceding the 1995 Act to suggest that the Commission envisaged that the common law rules would operate in parallel with the new statutory personal bar. In Lord Tyre's opinion the terms of the 1995 Act reflected the Commission's conclusion that the common law in this area should be replaced by the new statutory rules. The plain meaning of s1(5) was that the pre-1995 law of *rei interventus* and homologation was replaced in its entirety by the new statutory personal bar.¹⁴

D WAIVER

Lord Tyre considered it important to identify the correct starting point by determining what right it was said the defender was debarred from exercising. In Lord Tyre's view the correct question was whether the defender's right to prevent construction and leasing of the Primark development had been waived.

Evidence was led that in 2009 the layout of the site on which the Centre was built was permanently altered when a restaurant was constructed. Part of the land on which the restaurant was built formed part of the shared areas. This development had been discussed and agreed to at management committee meetings. The defender had not suggested that a more formal mechanism was required. In 2011 part of the car park was temporarily removed when the defender's premises were being reconfigured. This had also been discussed and approved of at management committee meetings. The Primark development had, in the same manner, been discussed and approved of at management committee meetings.

Lord Tyre was of the view that that evidence fell far short of establishing that there had been a voluntary, informed and unequivocal waiver by the defender of its right to prevent construction and leasing of the Primark development.¹⁵ The pursuer had erred in treating the defender's representatives (who attended the committee meetings and approved the minutes) as equivalent to the defender itself and had wrongly characterised the conduct of those individuals as the conduct of the defender. Those individuals were not empowered in terms of the defender's lease to take decisions affecting the

¹² As set out by Lord Kyllachy in *Carron Company v Henderson's Trs* (1896) 23R 1042 at 1049.

¹³ Report on *Requirements of Writing* (Scot Law Com No 112, 1988)

¹⁴ Para [20], agreeing with Lord Drummond Young in *The Advice Centre for Mortgages v McNicoll* who had referred to Professor Reid's annotations to the Current Law Statutes print of the 1995 Act.

¹⁵ Para [32]

defender's real rights in the shared areas.¹⁶ The fact that the restaurant had been built following approval at committee meetings was analogous on its facts to *Carron Company v Henderson's Trustees*¹⁷ in which coal workings were carried out, with the landlord's knowledge and tacit consent, in breach of the lease. The court held that although on the authority of *Bargeddie Coal Co v Wark*¹⁸ the landlord would have been barred by acquiescence from seeking any remedy for the past breach of the lease, this did not amount to an agreement to vary the lease. As such the landlord was not barred from demanding observance of the lease in the future. In this case there no doubt had come a time when the defender became barred by acquiescence from objecting to the interference with its real rights by the construction of the restaurant, but that did not bar the defender from insisting on compliance with the lease as regards the Primark development.¹⁹ The same considerations applied to the temporary use of car parking spaces during the defender's works.²⁰

E CONCLUSIONS

This decision follows the earlier Outer House decision of *The Advice Centre for Mortgages v McNicoll* in holding that s1(3) of the Requirements of Writing (Scotland) Act 1995 does not apply to leases where the parties intend to create real rights, this being the domain of s1(2)(b) of the Act rather than s1(2)(a)(i). Lord Tyre's decision makes clear that this is the position regardless of whether the real right under consideration relates to the principal subjects of the lease or a pertinent granted along with the principal subjects. Lord Drummond Young's decision in *The Advice Centre for Mortgages* is not without its critics,²¹ but this decision reinforces the fact that deficiencies of formality in relation to leases cannot be cured by the statutory personal bar provisions found in s1(3) and (4) of the 1995 Act where the parties intend that a real right be created.

The case also makes clear that the statutory personal bar provisions in s 1(3) and (4) of the Act entirely replace the pre-1995 law of *rei interventus* and homologation. Section 1(5) specifically mentions s1(2)(a) but this decision, again following *McNicoll*, makes plain that the old rules are no longer relevant. The requirement for a written document complying with s 2 is unqualified with regard to the creation, transfer, variation or extinction of a real right in land

¹⁶ Para [32]. The powers of the management committee were considered in more detail in an earlier hearing of this case reported at [2014] CSOH 59.

¹⁷ (1896) 23 R 1042

¹⁸ (1859) 3 Macq 467

¹⁹ Para [34]. There appears to have been a non waiver clause in the lease – the report refers to clause 104 of the lease but does not set out its terms.

²⁰ Para [35]

²¹ See A McAllister, *The Scottish Law of Leases*, (4th ed, 2013, Bloomsbury Professional), para 2.11 and 2.19-2.20 and A McAllister, "Leases and the Requirements of Writing", 2006 SLT (News) 254

(s1(2)(b)). The requirement for writing is qualified only in relation to contracts for the creation, transfer, variation or extinction of real rights in land (s1(2)(a)(i)) as such only s1(2)(a) is mentioned in s 1(5).

It does appear from the report of the case that there had not been a voluntary, informed and unequivocal waiver of rights by the defender. Indeed, it seemed that the individuals who attended the management committee meetings did not turn their minds to the terms of the defender's lease or were even aware of what those rights were.²² The case emphasises that past breaches of a lease by a tenant which have been overlooked or acquiesced in by the landlord do not prevent the landlord from seeking future compliance with the lease. Failing to object to a past breach is not tantamount to agreement to vary the lease to permit such behaviour in future.²³

²² Para [32]

²³ There has been a further hearing in this case where the landlords have successfully obtained declarator that the defenders are unreasonably withholding consent to the Primark development in terms of the lease. This case is reported as [2015] CSOH 14.